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7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE EASTERN DISTRICT OF WASHINGTON

9 UNITED STATES OF AMERICA, )  
10 ) No. 2:96-00259-WFN-1  
11 Plaintiff, )  
12 ) ROBERT BERRY'S  
13 ) RESPONSE TO THE  
14 v. ) GOVERNMENT'S  
15 ) SENTENCING MEMORANDUM  
16 ROBERT S. BERRY, )  
17 )  
18 Defendant. )

19 The Defendant, Robert Berry, through counsel, respectfully submits the  
20 following

21 1. Count S-9 Under Now-Applicable Law

22 Resentencing on count S-9 must be pursuant to the current version of  
23 § 924(c) as amended by section 403 of the First Step Act; which would mandate  
24 a consecutive 5 year sentence.  
25

1 The Government cites to the general Savings Clause (1 U.S.C. § 109), but  
2 that statute is not relevant here. According to *Dorsey v. United States*, it applies  
3 only to new statutes, “the word ‘repeal’ applies when a new statute simply  
4 diminishes the penalties that the older statute set forth.” *Dorsey v. United States*,  
5 132 S. Ct. 2321, 2329 (2012), citing *Warden v. Marrero*, 417 U.S. 653, 659-663  
6 (1974).  
7

8  
9 Thus, the § 403 amendment to § 924(c) is not a repealing statute; it does  
10 not diminish penalties, it leaves penalties unchanged and clarifies to whom those  
11 penalties can be applied.  
12

13 Mr. Berry herein incorporates by reference the argument he presented in  
14 Defendant’s Supplemental Briefing, ECF 473, pgs. 5-9.  
15

16 2. Terrorism Upward Departure

17 In its Sentencing Memorandum, the Government urges the Court to apply  
18 “an invited” upward departure, citing USSG § 3A1.4 and Amendment 637,  
19 effective November 1, 2002, which has little to do with a “terrorist motive.”  
20

21 The Government alleges Mr. Berry was “ideologically motivated” and  
22 “killing at the Planned Parenthood was [his] intent.” ECF 500, pgs. 15-16. Mr.  
23 Berry disputes these allegations and points out that the jury made no such  
24 findings.  
25  
26

1 Such an adjustment is unwarranted and, moreover, would violate the  
2 Constitution. The *ex post facto* issue inherent in applying this Guideline  
3 Amendment to a conspiracy that ended by October 8, 1996 is obvious. It is also  
4 apparent that a sentence resulting from a 12 level Guideline increase could not be  
5 upheld as reasonable on the facts encompassed by the jury verdict, which would  
6 implicate 6<sup>th</sup> Amendment issues.  
7

8  
9 Respectfully submitted this \_\_\_\_ day of July, 2020.  
10

11  
12 /s/John P. Nollette  
13 John P. Nollette  
14 Attorney for Robert Berry  
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16 CERTIFICATION

17 I hereby certify that on the \_\_\_\_ day of July, 2020, I electronically filed the  
18 foregoing with the Clerk of the Court using the CM/ECF System which will send  
19 notification of such filing to the following.

20 Joseph Harrington  
21 Assistant U.S. Attorney  
22 920 W. Riverside, Room 300  
23 Spokane, WA 99201

24 /s/John P. Nollette  
25 Attorney for Robert Berry  
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